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Issue Date: 23 December 2004

CASE NO.: 2002-LHC-2722

OWCP NO.: 07-149366

IN THE MATTER OF:

KEVIN HILL

Claimant

v.

GULF COAST FABRICATIONS

Employer

and

**RELIANCE NATIONAL INDEMNITY COMPANY,
IN LIQUIDATION, BY AND THROUGH,
THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION**

Carrier

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

DONALD P. MOORE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

**DECISION AND ORDER
ON SECTION 22 MODIFICATION**

This is a claim for Section 22 Modification of compensation

benefits under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et esq. (herein the Act), brought by Gulf Coast Fabrications (Employer) against Kevin Hill (Claimant).

On January 14, 2004, a Decision and Order was originally filed in this matter wherein Claimant was found temporarily totally disabled from June 17, 1998 to December 11, 1999, and permanently totally disabled from December 12, 1999 to present and continuing, based on an average weekly wage of $677.13 for compensable injuries to his right knee and low back, but not to his hip and ankle/foot. Employer was ordered to provide all reasonable and necessary medical expenses arising from the June 16, 1998 work injury to Claimant's right knee and his August 17, 1999 work injury to his back.

On March 8, 2004, Employer filed a request for Modification, asserting that it can demonstrate suitable alternative employment consistent with restrictions placed on Claimant after the original hearing in this matter. On March 31, 2004, Claimant filed a Motion for Modification of Order, requesting that Employer pay all reasonable and necessary medical expenses arising from his injuries, including psychiatric injuries and injuries to his back, hip, and ankle/foot.

A modification hearing was held on August 10, 2004, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 15 exhibits, Employer/Carrier proffered 6 exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and Employer/Carrier on October 12, 2004. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

[1] References to the transcript and exhibits are as follows: Transcript: Tr._____ ; Claimant's Exhibits: CX-_____; Employer/Carrier Exhibits: EX-___.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability.

3. The reasonableness and necessity of recommended surgery.

4. Entitlement to and authorization for medical care and services.

5. Attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified that he was born on June 5, 1958. Since the previous hearing, Claimant underwent "tests" to his right knee during treatment with Dr. Winters. Dr. Winters referred Claimant to Dr. Noblin for his knee concerns, who was treating Claimant at the time of trial. Dr. Noblin prescribed a knee brace to help support Claimant's knee and prevent it from buckling. Claimant testified that he was not taking medication for knee problems and that Dr. Noblin was seeking approval for right knee surgery. (Tr. 17-18). At the time of hearing, Claimant still experienced "a lot of pain" in his lower back and had been receiving back treatment from Dr. Whitecloud. (Tr. 21-22).

Claimant has experienced depression, anger, and anxiety since the prior hearing. He sought treatment with "Gulf Coast Mental" and Mobile Psychological Clinic. The Gulf Coast Mental Health Association prescribed Paxil and referred Claimant to Dr. Koch, a psychologist in Mobile, Alabama. (Tr. 19-20). Claimant underwent tests by Dr. Koch and was advised to "stay on the medication." Claimant testified the medication acts like a depressant and affects his ability to react normally to certain situations. (Tr. 20). Claimant was seen by "Dr. A" at Gulf

Coast Mental Health approximately one week prior to the hearing.[2] (Tr. 21). He discussed his inability to sleep with his treating psychologists or psychiatrists and was prescribed Trazadone. (Tr. 26). He also saw Dr. Maggio at the request of Employer, but does not recall the questions posed by Dr. Maggio. (Tr. 27-28).

Claimant continues to have sharp pains on both sides of his right knee. He wears a brace under his pants which he described as "two metal movable pieces on each side so it will move with my knee as I move for support, and it's got two straps, a strap at the top and one strap at the bottom." He also uses a cane prescribed by Dr. Flores. (Tr. 22). Claimant testified that he continues to have his right knee "give-out," specifically recalling an instance two months before the modification hearing where he fell in his bathroom and broke the little toe on his right foot. (Tr. 23). Ms. Coote has seen his knee give way since the last hearing. (Tr. 24).

At the time of hearing, Claimant was taking Paxil and the prescribed sleep medications. He was also taking Mobic for his arthritis and Lortab-10 for pain. He testified that he took 200 Lortabs each month. Claimant was also taking Neurontin until he discovered he was allergic to the drug. The medications were prescribed by Dr. Whitecloud. (Tr. 28-29). He testified that the Mobic makes him "drowsy and nervous;" the Lortab makes him "sleepy and disoriented;" the Paxil "just have you laid back;" and the Trazadone is "like being completely knocked out." (Tr. 29-30).

Claimant testified that he tries not to drive when taking his medication because it causes him to "fall asleep at the steering wheel." (Tr. 25). He has difficulty driving because sometimes he will "catch cramps" in his right hip. He is not able to bend or stoop because his hip does not support his weight. He testified that he has a low energy level and feels "drained all the time." (Tr. 31).

The knee brace has not improved his walking ability since the prior hearing. During a typical day, Claimant "lays around" on his sofa and bed. He cannot do yard work because of his back and legs, and his wife does cooking and cleaning around the house. His son maintains his home and vehicle because Claimant

[2] According to Dr. Maggio's report, Claimant was treated by Dr. Abashidze at the Gulf Coast Mental Health Center.

is not able to do so. (Tr. 26-27). He can "hardly lift anything" because his "back won't support [him]." (Tr. 29).

Claimant is still pursuing a claim for Social Security Disability. Since the previous hearing in this claim, he has met with Mr. Walker and Ms. Hutchins, vocational counselors. He truthfully answered questions posed by both individuals regarding his injury, limitations, work history, and his ability to return to work. (Tr. 21-22). Claimant has not returned to work since 1999, but did apply for jobs recommended by Mr. Walker. Claimant was not offered any of the jobs for which he applied. He does volunteer work with "Port and Harbor and Perlington Water and Sewer" and he is active in the "administration" of his church. (Tr. 25). He has not undergone any training or schooling since the first formal hearing on this claim. (Tr. 29).

On cross-examination, Claimant testified that he saw Dr. Koch on three occasions and that he does not take medications for his right knee. (Tr. 32).

Claimant received Mr. Walker's report in February 2004, but applied for employment between April 13, 2004 and May 15, 2004. According to Claimant these were the only jobs he applied for since the last hearing. (Tr. 32-33). Claimant testified that he mistakenly indicated that he had convictions on one application. On one application, Claimant indicated that he could work "day only" and that he had physical conditions that may limit his ability to perform the job. (Tr. 33-34). On an application for "The Pantry," Claimant indicated that he would only be available from 9:00 a.m. until 2:00 p.m. on Tuesday, Wednesday, Thursday, and Friday. (Tr. 34). On an application for Clark Oil, Claimant applied for part-time work only and indicated he had not reviewed the job description for the position. (Tr. 34-35). He also indicated that he did not understand the job requirements and that he could not perform the requirements "with or without reasonable accommodation." (Tr. 35).

Claimant did not seek authorization from Employer/Carrier before beginning treatment with Dr. Whitecloud. He also began seeing Dr. Winters before asking for authorization and sought authorization after he was told how to do so. (Tr. 35-36). Claimant began treatment with Gulf Coast Medical Center after the first hearing and did not seek authorization prior to treatment. Claimant did not see a doctor or receive treatment

for the injury to his little toe on his right foot, but he knows it was broken. (tr. 36-37).

On redirect examination, Claimant testified that he delayed his job search because no doctors had told him to look for employment. He indicated the hours he was willing to work on applications because he "assumed if [he] had to do anything it would be the best thing to try to do . . . the best hours to try to work." (Tr. 38-39).

On recross-examination, Claimant testified that the hours he works with the Port Commission would not interfere with his ability to perform a job because the Port Commission can conduct its business without his presence. (Tr. 39-40). Claimant receives a per diem of $40.00 per meeting with the Port Commission. He received a 1099 form reflecting approximately $1,000.00 in per diem and mileage reimbursement for "last year." (Tr. 40-41).

Ms. Andrea Coote

Ms. Coote is employed with Mississippi Action for Progress and Wal-Mart. (Tr. 42). Ms. Coote also sells "Home Interior" which Claimant's wife purchases from her. She has no training in the medical field. (Tr. 45). She knows Claimant through his wife and has known him for at least 15 years. She visits Claimant's home to deliver orders and her visits vary from month to month, depending on whether Claimant's wife places an order. (Tr. 43). Ms. Coote has been in Claimant's home since May 21, 2003. During a visit since May 21, 2003, the date of the original hearing, and within the last nine months, Ms. Coote saw Claimant "stumble" but "not fall completely to the ground." She "assumed" he was having difficulties with his right leg. Claimant told her that his knee buckled. Claimant had his walking cane. (Tr. 44-46). She estimated the incident occurred within three or four months prior to the modification hearing. (Tr. 45).

Mr. Joseph H. Walker

Mr. Walker is an expert in the field of Vocational Rehabilitation Counseling and was retained by Employer/Carrier. (Tr. 56). He testified at the hearing and was deposed by the parties on May 19, 2004. In addition to preparing reports for this case, Mr. Walker interviewed Claimant and reviewed medical records, the hearing transcript of Claimant's testimony in the first hearing, and the Decision and Order issued in this claim

on January 14, 2002. Since preparing his reports, Mr. Walker reviewed the report from Ms. Hutchins, as well as additional medical records from Gulf Coast Mental Health Center, Dr. Maggio, and Dr. Koch. He also received a copy of the Decision and Order from the Social Security Administration, Office of Hearing and Appeals. (Tr. 57-58).

Regarding his testimony at the Social Security hearing, Mr. Walker received limited information prior to the hearing, except for Claimant's vocational history and educational history. He appeared at the request of the Social Security Administrative Law Judge to do additional vocational research concerning exertional levels, past work activity and skill levels, and transferability of skills in an individual over 50 years old as it relates to Social Security regulations. He was also asked to respond to hypothetical questions dealing with certain issues, which he addressed from a "holistic standpoint." (Tr. 59). For the Social Security hearing, Mr. Walker considered available employment for south Mississippi from Jackson, and including New Orleans and Mobile. (CX-8, p. 9).

Mr. Walker believed that Claimant's use of a cane would preclude some jobs within a "modified light" or medium job classification. In addition, the cane use would rule out jobs from a range of sedentary work up to 65 pounds. However, he also opined that the use of a cane "would not be a factor as far as performing essential tasks of a job" with certain sedentary office-type employment. (CX-8, pp. 18-19). Mr. Walker considered "exertional components" as set forth in the Functional Capacity Evaluation (FCE), the issues recognized in the Decision and Order, and the right knee restrictions outlined by Dr. Flores. These factors were reflected as "Assumption No. 1" in his reports. (Tr. 60). In "Assumption No. 1," Claimant's educational background was treated as one that was literate, able to perform basic mathematical calculations and count money. The first assumption considered the physical restrictions of no crawling and no vertical ladder climbing, and assumed Claimant could perform a range of medium, light, or sedentary activity of an unskilled or semi-skilled classification. Mr. Walker identified the following ten available job openings in his report dated February 9, 2004, which he considered suitable alternative employment based on the assumptions and restrictions considered in the first hypothetical:

> (1) a cashier position with Murphy Oil, USA, in Slidell, Louisiana. The job duties consisted of monitoring gas consoles and making change. The position was classified as

"modified Light or semi-sedentary." The employee would have intermittent breaks and use of a stool; there was no heavy lifting, crawling, or ladder climbing. The entry wage was $7.50 per hour for a 25-hour week. The employee would have the opportunity to work a 40-hour week while working at a combination of stores in the "immediate community of Slidell, La., Picayune, Ms., Pass Christian and/or Waveland, Ms." (CX-8, p. 86).

(2) a security guard with Gulf Coast Security in Bay St. Louis, Mississippi. The employee would be allowed to use an elevator instead of climbing steps. The job was classified as "modified Light" and the employee would be allowed intermittent breaks. No heavy lifting, crawling, or ladder climbing was required. The employer contact indicated that Claimant's needs could be accommodated. The entry wage was $6.00 per hour, with a 35-40 hour work week. The position was available as of January 16, 2004. (CX-8, p. 86).

(3) a cashier position with Exxon Gas Station in Slidell, Louisiana. The physical requirements were classified as "modified Light" with intermittent breaks and the use of a stool. The position did not require heavy lifting, crawling, or ladder climbing. The duties included accepting payment for goods and processing credit cards; employees on the night shift stock the store, but accommodations could be made if needed. The job paid an entry wage of $6.50 per hour with a 32-40 hour work week. The position was available as of January 16, 2004. (CX-8, pp. 86-87).

(4) a cashier at Cracker Barrel in Slidell, Louisiana. The position was considered "Modified Light" with intermittent breaks and use of a stool. The job duties consisted of receiving payment for purchases and processing credit cards. No heavy lifting, crawling, or ladder climbing was required. The job paid an entry wage of $6.00 per hour. The employee would work 15 hours per week with the opportunity to work 30-35 hours per week. The position was available as of January 16, 2004. (CX-8, p. 87).

(5) a shuttle bus driver with Grand Casino in Gulfport, Mississippi. The position was "modified Light" with intermittent breaks. The job did not require heavy lifting, crawling, or ladder climbing. The driver could stand and stretch when passengers disembark. The position

required a chauffer license or a commercial license with a passenger endorsement. It paid $6.00 per hour with a 40-hour work week. The position was periodically available. (CX-8, p. 87).

(6) a cashier with Chevron Food Mart in Long Beach, Mississippi. The job duties consisted of accepting payment for goods and monitoring gas consoles, while the night shift was additionally in charge of "entire stocking." The job was considered "modified Light" in nature with intermittent breaks and use of a stool. The job did not require heavy lifting, crawling, or ladder climbing. The position paid an entry wage of $5.15 per hour with a 30-hour work week. The job was available as of January 16, 2004. (CX-8, p. 87).

(7) a cashier with Kangaroo Food Mart in Long Beach, Mississippi. The position was considered "Light Modified" in nature. The job did not require heavy lifting, crawling, or ladder climbing, and the employee would be allowed intermittent breaks. The duties included monitoring gas consoles, accepting payment for goods, and processing credit cards. The entry wage was $5.15 per hour with a 20-30 hour work week. (CX-8, pp. 87-88)

(8) a booth attendant at Copa Casino in Gulfport, Mississippi. The employee would insure that valet runners have the proper keys. The job did not require heavy lifting, crawling, or ladder climbing. It was considered "modified light" in nature with intermittent breaks. The position paid $5.50 to $6.00 per hour with a 30-hour work week. The position was available as of January 16, 2004. (CX-8, p. 88).

(9) a cashier or server with Sicily's Pizza in Bay St. Louis, Mississippi. The job duties included accepting payments and making change. It was "modified light" in nature. The employee would be allowed intermittent breaks and use of a stool. The position did not require heavy lifting, crawling, or ladder climbing. The cashier position paid $5.15 per hour with a 15-20 hour work week. The position was available as of January 16, 2004. (CX-8, p. 88).

(10) a valet dispatcher with Casino Magic in Bay St. Louis, Mississippi. The job duties included welcoming guests, maintaining movement of vehicles to the back lot, checking

incoming vehicles for noticeable flaws, issuing valet lot designation numbers, keeping records of all transactions and incoming vehicles. The work was considered light in nature. The employee would be allowed intermittent breaks and would not be required to engage in heavy lifting, crawling, or ladder climbing. The position paid $7.80 per hour with a 40-hour work week. The position was available as of January 16, 2004. (CX-8, p. 88).

In Hypothetical No. 2, Mr. Walker again considered the permanent work restrictions of no heavy lifting, crawling, or ladder climbing assigned for Claimant's right knee. Mr. Walker also considered Claimant's complaints associated with his back, right hip, and left ankle without a question of causation. (Tr. 62; CX-8, p. 58). Mr. Walker was aware that Claimant used a cane, complained of pain and depression, and experienced side effects due to his medications. However, Mr. Walker believed these issues were "undeveloped" as he did not have medical records to address the issues. Consequently, Mr. Walker considered Claimant's cane use, pain and depression, and the side effects of medication as relevant factors, but not to the extent that Claimant would be precluded from working a 40-hour week. (Tr. 63-64; CX-8, p. 58). Using the aforementioned criteria for Assumption No. 2, as well as the assumption that Claimant could perform in a "modified range of Light (sit intermittently, primarily walking and standing periodically) and a full range of Sedentary or Semi-Sedentary activity," Mr. Walker identified seven job openings in the report dated April 30, 2004:

(1) a security guard with Capital Security at the Visitors Welcome Center in Hancock County, Mississippi. The job duties included driving a golf cart around the rest area to monitor the safety of visitors and employees. The job requirements were "modified Light activity" with no heavy lifting, crawling, or ladder climbing. The employee could sit, stand, or walk. The job was full time and paid an entry wage of $7.50 per hour. The job was available on a periodic basis. (CX-8, p. 58).

(2) a shuttle van driver with Memorial Hospital in Gulfport, Mississippi. The job duties consisted of driving patients to and from the hospital parking lot. A commercial drivers license was not required and use of a cane would not preclude consideration for the position. The job was considered a "modified range of Light activity" and consisted of "sitting-driving activity," limited

standing and walking, and operation of a 6-passenger van. The position was full-time and paid $6.00 per hour. The job was available on a periodic basis. (CX-8, pp. 58-59).

(3) a teller/cashier with Easy Check Cash in Gulfport, Mississippi. The position was sedentary and required sitting with intermittent walking. The job duties included explaining procedures and contracts to customers, as well as cashing checks. The entry wage was $6.25 per hour with a 25-hour work week. (CX-8, p. 59).

(4) a telephone solicitor with the Mississippi Benevolence Police Association in Gulfport, Mississippi. The job was sedentary in nature and primarily required sitting at a desk. The employee would be allowed intermittent breaks with sitting, standing, and walking. Typing skills were not required. The entry wage was $6.00 per hour. The employee could work part-time with three separate shifts for up to 24 hours per week, or the employee could work two shifts for up to 40 hours per week. (CX-8, p. 59).

(5) a booth cashier at Food Giant – Pump and Save in Gulfport, Mississippi. The employee would "monitor gas consuls," accept payment, and process credit cards. The position was "semi-sedentary" with the option to sit, stand, and walk. The entry wage was $6.00 per hour for a 35-hour work week. The position is available on a periodic basis. (CX-8, p. 59).

(6) a parking lot booth cashier with Republic Parking at the Gulfport/Biloxi Regional Airport in Gulfport, Mississippi. The job was "semi-sedentary" with intermittent breaks and the option to sit, stand, and walk. The duties consisted of collecting parking fees and handling money. The entry wage was $6.00 per hour. Part-time and regular shifts were available, working up to 36-40 hours per week. The job was available on a periodic basis. (CX-8, p. 60).

(7) a customer service/order clerk with the Pizza Hut Call Center in Long Beach, Mississippi. The position was sedentary and paid an entry wage of $6.00 per hour. The employee would work 35-40 hours per week. Positions were available as of January 16, 2004. (CX-8, p. 60).

In the April 30, 2004 report, Mr. Walker also listed six available job openings using the restrictions identified in Assumption No. 1[3]:

> (1) a part-time cashier at Movie Gallery in Gulfport, Mississippi. The job duties involved stocking videos, making sales or checking out movie rentals, and handling money. The job required standing and walking within the store and behind a counter for 5-6 hour periods, with two 15-minute breaks during a daily shift. The position paid $6.00 per hour, and the employee would work 20 hours per week. (CX-8, p. 56).
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> (2) a security guard at Imperial Palace Casino in Biloxi, Mississippi. The physical requirements were described as "light" in nature with standing and walking. The job duties consisted of monitoring areas of the property for the safety of employees and guests. The position was full-time and paid $9.00 per hour. (CX-8, p. 56).
>
> (3) a hotel desk clerk at Imperial Palace Casino in Biloxi, Mississippi. The job was "light in nature" and allowed standing, walking, and intermittent breaks. The employee would register guests, issue keys, handle reservations, and process payments. The position paid $8.00 per hour for a 30-hour work week. (CX-8, p. 56).
>
> (4) a cashier-checker or customer service representative with WalMart in Waveland, Mississippi. The positions were compatible with the restrictions of no heavy lifting, crawling, or ladder climbing. The contact at Wal-Mart stated that consideration would be for "irregular part-time positions working less than 24 to 28 hours per week and regular part-time positions working greater than 24 and up to 36, less than 40 hours per week." The hourly wage for the irregular part-time position was $5.50 per hour. The wage for the regular part-time position was $6.50 per hour. (CX-8, pp. 56-57).
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> (5) a front desk clerk at Treasure Bay Casino Resort. Entry wage information was not available. The State of Mississippi, Labor Market Information 2002, Occupational Employment and Wage Estimates of Biloxi MSA indicated a

[3] Assumption No. 1 identified restrictions of no heavy lifting, no crawling, and no ladder climbing. From the restrictions, Mr. Walker concluded Claimant was capable of a "modified range of Medium, Light and a full range of Sedentary activity." (CX-8, p. 55).

"mean hourly" wage of $7.67 and an "entry hourly" wage of $7.67 for a desk clerk. (CX-8, p. 57).

(6) a table games dealer with Treasure Bay Casino Resort. Entry wage information was not available. The State of Mississippi, Labor Market Information 2002, Occupational Employment and Wage Estimates of Biloxi MSA indicated a "mean hourly" wage of $7.37 and an "entry hourly" wage of $6.82 for a gaming dealer. (CX-8, p. 57).

The report of April 30, 2004, also indicated that Mr. Walker contacted representatives with Gulf Coast Security in Bay St. Louis, Mississippi. Claimant had submitted an application for employment. Mr. Walker reported Claimant "could be considered for opportunities" with the restrictions of "Medium, Light, with no heavy lifting, no crawling, and no ladder climbing were it not for the cane." In addition, Mr. Walker reported that any side effects associated with medication would not be acceptable if it precluded "task completion and function." (CX-8, pp. 57-58).

In Assumption No. 3, Mr. Walker accepted Claimant's physical history and added the factors of pain, discomfort, and lack of tolerance to activity. He also considered Claimant's depression, any psychological factors that would hinder Claimant's attention and concentration, and the side effects of Claimant's medication. Mr. Walker concluded that Claimant could not return to employment if the above factors were supported by a medical foundation. (Tr. 64-65; CX-8, p. 61).

According to Mr. Walker, the reports from Gulf Coast Mental Health Center did not contain findings that Claimant was disabled from a work standpoint. (Tr. 66). While Dr. Koch described Claimant as "functionally illiterate," Mr. Walker found Claimant to be a literate individual after considering his high school transcript, work history, and on-the-job-training received for his gaming license. Specifically, Mr. Walker noted Claimant graduated above the 50th percentile in his high school class. (Tr. 66-67). Dr. Koch administered an IQ test, a Wide Range Achievement test, and a memory test, which Mr. Walker conceded were accepted in the field of neuropsychology. However, Mr. Walker contended there was contrasting information when comparing the test results to Claimant's past work history, work duties, and high school transcript. Although the work history, duties, and high school transcript do not "offer a direct correlation to IQ," Mr. Walker indicated they are

"representative of levels of achievement which have some corresponding value." (Tr. 70).

At the time of his deposition, Mr. Walker had not reviewed all of Claimant's medical records. Of the opinions expressed at the Social Security disability hearing, he would expect variation in the second hypothetical depending on the "severity of the combined exertional and non-exertional factors." (CX-8, p. 22). At the time of the instant hearing, Mr. Walker had not reviewed medical records from Dr. Winters or Dr. Noblin. Therefore, he could not state whether their opinions would affect the outcomes of Assumption No. 1 or Assumption No. 2, but opined the opinions would have some bearing on his assumptions if the doctors changed Claimant's restrictions. (Tr. 73-74).

Ms. Kelly Hutchins

Ms. Hutchins has been a Certified Rehabilitation Counselor since 1991. She has worked as a vocational expert in the Mississippi Gulf Coast area since 1993 and has "worked private rehab." She has been self-employed along the Mississippi Gulf Coast for the last two years. She is a Certified Rehabilitation Counselor with a commission of Rehabilitation Counseling. She is licensed with the Louisiana Board of Vocational Rehabilitation Providers and holds an OWCP Certification for work with the Department of Labor on OWCP cases. Ms. Hutchins has done work with the Social Security Administration since approximately 1994. At the hearing she was accepted as an expert in the field of vocational rehabilitation counseling. (Tr. 47-49).

Ms. Hutchins reviewed Mr. Walker's reports and deposition, read the transcript and the decision of the previous hearing, and reviewed records from Gulf Coast Mental Health, Dr. Koch, and Dr. Maggio. Ms. Hutchins met personally with Mr. Hill and spoke with him for approximately two hours about his "circumstances and situation." (Tr. 49-50). During the interview, Claimant discussed the side effects of his medications and the limitations on his daily activities due to pain and fatigue. He indicated that Dr. Noblin advised him to undergo right knee surgery and that Dr. Dickson supported this recommendation. (CX-14, pp. 8-12).

She also rendered a report dated July 16, 2004, in which she concluded Claimant was "not employable at any level of work activity." (CX-14, p. 13). Ms. Hutchins opined Claimant is "unable to sustain any type of work on any physical level at

this point and time." She based her opinion on Claimant's "numerous orthopedic impairments" and the resulting permanent physical limitations and "chronic pain issues." In addition, she noted his medication causes side effects that interfere with Claimant's ability to sustain concentration, to remain awake and alert, and to have the stamina to work a full work-week. (Tr. 50; CX-14, p. 13).

Ms. Hutchins agreed that Mr. Walker identified suitable jobs based on the assumptions he used in each hypothetical situation. However, she opined the third assumption was the correct assumption for Claimant, in which Mr. Walker indicated he did not feel Claimant was capable of working. (Tr. 51). In the third assumption, Mr. Walker considered that Claimant's pain and physical stamina prevented him from sustaining a full time work week and that the side effects of his medication would prevent him from adequately performing work tasks. (Tr. 53).

On cross-examination, Ms. Hutchins agreed that Claimant is employable when considering only the restrictions regarding his right knee. (Tr. 52). Even after reviewing the records of Dr. Winters and Dr. Noblin, Ms. Hutchins still agreed with the findings of Mr. Walker's first and second assumptions. (Tr. 76). However, according to her report based on the interview and review of Claimant's medical records, Ms. Hutchins's findings were "consistent with those of Mr. Joe Walker's 'third assumption.'" (CX-14, p. 13).

The Medical Evidence

Tulane Medical Center

Claimant submitted 359 pages of medical records from Tulane Medical Center pertaining primarily to his two surgical procedures in 2001: (1) a right hip surgery on May 14, 2001, and (2) a left ankle surgery on June 25, 2001.

The "Patient Care Admission Sheet," dated May 12, 2001, reflected that Claimant had previously undergone a right hip "closed reduction" and two right knee surgeries. The admission sheet further noted Claimant presented with a limited range of motion in his right hip and complained of a "sharp stabbing pain." Further, Claimant presented with fractures in his right hip and left foot. (CX-13, pp. 233-234). The "Patient History" dated May 12, 2001, indicated that Claimant "fell at church" on April 28, 2001 and underwent a "closed reduction" for right hip injuries at Hancock Hospital in Mississippi.

Claimant was admitted to Tulane University Hospital and Clinic (Tulane Hospital) on May 12, 2001 and was discharged on May 22, 2001, following an "open reduction, internal fixation of posterior wall acetabular fracture." (CX-13, p. 96). Claimant submitted copies of daily "Medical/Surgical Flow Sheets" which tracked Claimant's condition and progress during his stay at Tulane Hospital. (CX-13, pp. 178-229). On May 20, 2001 and May 21, 2001, Claimant complained of pain in his right hip. On May 21, 2001, Claimant also complained of continuing numbness in his right foot. On May 22, 2001, the "flow sheet" indicated Claimant experienced aching and throbbing in his right hip. (CX-13, pp. 180-189).

Following the surgery on May 14, 2001, Claimant underwent a "consultation" with Dr. Ellen Zakris on May 15, 2001. According to the consultation report, Claimant **fell off a ladder** at his church and subsequently underwent surgery on his right hip. The report indicated Claimant was "doing well post-op." (CX-13, p. 255).

Claimant was discharged from Tulane Hospital on May 22, 2001. According to Dr. Dickson's "Discharge Summary," Claimant was referred to Tulane Hospital after receiving treatment on his right hip in Mississippi. Dr. Dickson found Claimant to have "a comminuted posterior wall fracture of the right acetabulum" and to have pain and tenderness of his left foot. (CX-13, p. 96). On May 14, 2004, a post-surgery radiograph of his pelvis showed "good alignment of the bones" while the remaining bones appeared to be "intact." (CX-13, p. 252). On May 17, 2001, a radiograph of Claimant's hips revealed no evidence of hardware failure or loosening, but the findings suggested "minimal diastasis of the right sacroiliac joint." (CX-13, p. 86). After performing surgery on Claimant's right hip, Dr. Dickson obtained a CT scan of his left foot which revealed a left calcaneus fracture. (CX-13, pp. 90, 96). Radiographs of Claimant's left ankle and left foot showed no evidence of fracture or dislocation in those areas. (CX-13, pp. 247, 249). Claimant was restricted to "nonweightbearing" on his left lower extremity with "toe-touch weightbearing" on his right lower extremity. Claimant was discharged in stable condition. (CX-13, p. 96).

On May 31, 2001, Claimant was examined by Dr. Dickson who noted Claimant was "doing well." Claimant complained of a burning sensation during urination and was referred to a "UA." Claimant also presented complaints of a shooting pain in his leg, which Dr. Dickson attributed to a bruised sciatic nerve.

Dr. Dickson opined Claimant's pain and erectile difficulties would improve. Dr. Dickson recommended that Claimant undergo surgery for his left calcaneus fracture. (CX-13, p. 39).

Claimant was admitted to Tulane Hospital for left calcaneus surgery on June 25, 2001, and was discharged on June 27, 2001. (CX-13, p. 284). The admission sheet dated June 25, 2001, noted a limited range of motion due to a shattered right hip and shattered left calcaneus. (CX-13, p. 331). On June 25, 2001, Dr. Dickson performed an "open reduction internal fixation" on Claimant's left calcaneus. According to the operative report, the procedure involved the "tedious removal of the callus." During the surgery, the "superior piece was reduced" and some "pieces of articular surface" could not be found and located. Overall, Claimant tolerated the procedure well. (CX-13, pp. 350-351). The "Medical/Surgical Flow Sheets" documented complaints of throbbing in Claimant's left ankle on June 25, 2001, and complaints of pain in his left ankle on June 26, 2001. (CX-13, pp. 313, 317). An undated post-operative consultation report noted Claimant suffered from left testicular atrophy. (CX-13, p. 339).

The "Discharge Summary" noted Claimant sustained his right acetabular fracture and left calcaneus fracture in a **motor vehicle accident** on April 28, 2001.[4] (CX-13, p. 284). However, an "Occupational Therapy ADL Screening/Evaluation" indicated Claimant suffered injuries after **falling from a ladder** in April 2001. (CX-13, p. 341). Claimant was discharged as stable with restrictions of "non-weight bearing on the left lower extremity and touch-down weight bearing on the right lower extremity." (CX-13, p. 284).

Following his hip and ankle surgeries, Claimant continued follow-up treatment with Dr. Dickson and Tulane Hospital. On July 5, 2001, Claimant was examined by Dr. Gilberto Ruiz-Deya and presented with complaints of decreased erectile response and numbness following his surgeries. Dr. Ruiz-Deya opined that it would be "unlikely to have erectile dysfunction secondary to neurological damage, when there is no other evidence of lost or any neurological deficit in the lower extremities."[5] (CX-13, pp. 28-29).

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[4] At the first hearing in this matter, Claimant submitted a report from Dr. Dickson in which he clarified that the notation in Claimant's chart indicating he was in a motor vehicle accident was a mistake.

[5] Claimant was examined by Dr. Freddy Mendez on November 4, 2002, for a follow-up on his complaints of erectile dysfunction. Claimant indicated that he was doing well on Viagra. A physical examination revealed "no masses, no

On July 19, 2001, Claimant was examined at the office of Dr. Wilson and Dr. Dickson. An unsigned report noted complaints of minimal right hip tenderness and moderate pain in Claimant's left foot. Claimant was instructed to continue "non-weight bearing" status on his left calcaneus for six weeks. He was also instructed to continue "touch-down weightbearing" on his right acetabulum and was prescribed physical therapy. (CX-13, pp. 25-26). On September 13, 2001, Drs. Wilson and Dickson indicted Claimant presented with complaints of moderate tenderness of his foot and ankle during "weightbearing attempts at home." Claimant was experiencing a "small amount of pain" in his right hip, which he indicated was improving. Radiographs showed "excellent reduction of the posterior wall acetabular fracture and good preservation of the joint space of the right hip" and "good position" of the left calcaneus. (CX-13, pp. 22, 77-80). Claimant was instructed to begin weightbearing in conjunction with physical therapy and his weightbearing restrictions were removed. (CX-13, p. 23).

On November 1, 2001, Dr. Dickson examined Claimant and reported that his right hip had slowly improved. Claimant had increased his weightbearing status, but experienced continued pain in his left foot. A radiograph of Claimant's left calcaneus revealed that the middle screw of the "T plate" extended into the "calcaneocuboid joint," which Dr. Dickson opined was the cause of Claimant's pain. Claimant was scheduled for "aggressive" physical therapy. (CX-13, p. 17). On May 9, 2002, Claimant returned to Dr. Dickson and reported that he experienced occasional groin pain. Dr. Dickson noted that Claimant walked with a cane and tended to have pain after "long ambulation." However, Claimant's x-rays appeared normal.[6]

On February 20, 2003, Claimant returned to Dr. Dickson with complaints of increased left hip pain. Claimant indicated that he also experienced pain in his left ankle which "continually feels sprained." He reported numbness in his lower extremity that "radiates down the back of his left thigh into his calf and down all the way to his toes." Dr. Dickson found Claimant's lower back to be tender in the "L4-L5 sacral area." He noted no pain and a nearly full range of motion in Claimant's right hip.

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nodules, no hydrocele, and no hernia." Dr. Mendez found a decreased range of motion in Claimant's right hip, but no other evidence of "gross neurological deficits." (CX-13, p. 13).

[6] On May 9, 2002, a film of Claimant's heel showed "spurring from the inferior calcaneus." (CX-13, p. 74).

Claimant experienced "grind pain" in his left hip with internal and external rotation of the hip. Claimant was "non-tender over the calcaneus," although he was tender around the "peroneal tendon sheath" and "subtalar area." (CX-13, p. 10). A radiograph of Claimant's hip revealed a "mild degree of sclerosis" in the "iliac side of the right sacroiliac joint" which was opined to be degenerative. (CX-13, p. 72). An x-ray of Claimant's ankle revealed a "large calcific spur" at "the insertion of the plantar fascia onto the calcaneus." (CX-13, p. 66). Dr. Dickson diagnosed Claimant with possible left hip arthritis, low back pain, and peroneal tendonitis. (CX-13, p. 10).

On June 2, 2003, Dr. Whitecloud examined Claimant for his complaints of low back pain. Among the symptoms indicated by Dr. Whitecloud were falls, depression, and numbness in Claimant's legs. Claimant walked with an antalgic gait and used a cane. (CX-13, pp. 1-2). Dr. Whitecloud prescribed Elavil, a Duragesic Patch, and Lortab. (CX-13, pp. 3-4).

Gulf Coast Mental Health Center

Claimant was first treated at the Gulf Coast Mental Health Center on November 11, 2003, upon "referral by his physician." Claimant presented with complaints of "numerous health problems" including prior surgeries on his back, knee, foot, and hip. Claimant explained that he had been denied "SSI" and was under financial stress. Claimant stated he was not depressed, but was "angry about health problems and the system." He was taking the following medications at the time of his initial evaluation: Celebrex, Prilosec 20 mg, Lortab 10 mg, and Neurontin. Claimant denied any personal problems with drugs or alcohol. He was diagnosed with "311 Depressive Disorder NOS." (CX-10, pp. 3-5).

On December 5, 2003, Claimant was again treated at Gulf Coast Mental Health Center. He continued to experience pain and health problems. He admitted to feeling depressed and indicated concern about his financial obligations. (CX-10, p. 6). On January 8, 2004, Claimant was still seeking medical assistance for his injuries. He identified depressive symptoms and "vented" about the disability process being unfair. (CX-10, p. 6). On January 30, 2004, Claimant was experiencing increased difficulties and pain. He also expressed difficulty with his anger and described instances where he had "gone off" on others. (CX-10, p. 7).

On March 15, 2004, Claimant indicated that he noticed a "difference in irritability and frustration with medication."[7] He discussed the difficulties with his disability and showed relief after discussing finances with his wife. (CX-10, p. 9). On April 6, 2004, Claimant complained of daily pain and frustration with his physical abilities and the disability issues. He reported continued incidents of "going off" on others. Claimant was prescribed Trazodone 150 mg and Paxil CR 25 mg. (CX-10, pp. 9, 21).

At the request of his counsel, Claimant underwent an evaluation by a doctor in Mobile, Alabama. He returned to Gulf Coast Mental Health Center on April 27, 2004, and expressed anger about receiving different opinions from "different professionals." He continued to express frustration with his disability case. He indicated that he becomes angry to the point where "I can't think straight." (CX-10, p. 17). On May 27, 2004, Claimant opined that he was not benefiting from medication. He indicated that he was denied disability and that his physician recommended another knee surgery. Claimant was frustrated with his physical problems and "legal issues." (CX-10, p. 17).

Dr. Daniel Koch, Ph.D.

Claimant was initially evaluated by Dr. Koch, a clinical psychologist, on April 21, 2004, at Counsel for Claimant's request. On May 24, 2004, Dr. Koch rendered a Neuropsychological Evaluation. Claimant presented with complaints of the following: sleep disturbance, anger and temper control issues, feelings of loneliness, depression, stress, health concerns, thought disturbance, and memory problems. Claimant was taking Loratab 10, Paxil PR, and Mobic Trazadone. Claimant was initially hostile and unwilling to cooperate, but relaxed once testing began. (CX-11, p. 6).

Dr. Koch administered the Wechsler Adult Intelligence Scale-III. Claimant obtained a Full Scale IQ Score of 82, placing him in the 12th percentile with a "corresponding classification" in the "Low Average range of intellectual ability." Claimant scored in the "borderline range with a Verbal IQ Score of 77. His Performance IQ Score was 91, indicating the "Average range of intelligence." Dr. Koch concluded Claimant's performance skills were "better retained"

[7] The record contains a report dated February 13, 2004; however, the handwritten report is illegible.

than verbal skills. (CX-11, p. 8).

Dr. Koch also administered a Wide Range Achievement Test-3. Claimant achieved a fourth grade equivalency in reading, a third grade equivalency in spelling, and a sixth grade equivalency in arithmetic. Dr. Koch found the results to be significantly lower than expected given Claimant's educational level. He also found the reading and spelling results to be lower than expected given Claimant's IQ scores. (CX-11, p. 8).

Dr. Koch noted that scores in the range of 0 to 25 on the Neuropsychological Deficits Scale are in the normal range. All of Claimant's scaled scores ranged from 2 to 43. Through Neuropsychological Deficits Scale Scores, Dr. Koch placed Claimant in a diagnostic category of "Moderate Neuropsychological Impairment" without further explication.

The Minnesota Multiphasic Personality Inventory-II indicated Claimant experienced "a clinically significant level of depression with thought disorder." Dr. Koch found Claimant to be "withdrawn, lack[ing] energy and feel[ing] overwhelmed with problems." Dr. Koch's diagnostic impression was that Claimant suffered from "Major Depressive Disorder with Psychotic Features." Dr. Koch noted that treatment with anti-depressant medication was indicated for Claimant. (CX-11, p. 9).

In a report dated August 5, 2004, Dr. Koch commented on the Psychiatric Evaluation by Dr. Maggio. Dr. Koch disagreed with Dr. Maggio's diagnosis of "Disorder with Mixed Emotions." He notes that according to the DSM-IV, published by American Psychiatric Association, this disorder cannot exist for more than 6 months without being considered chronic, a designation that Dr. Maggio did not specify in his diagnosis. Consequently, Dr. Koch stated Dr. Maggio's diagnosis was "inappropriate." Dr. Koch did agree that Claimant suffered from "Pain Disorder Associated with both Psychological Factors and a General Medical Condition – Back Pain – Chronic;" however, he would not limit the pain problem to Claimant's back, as the knee injury was both disabling and painful. (CX-11, pp. 2-3).

Unlike Dr. Maggio, Dr. Koch opined Claimant suffers from "major depression" and based his opinion on the Minnesota Multiphasic Personality Inventory II. He agreed that Lortab can "compound and exacerbate" Claimant's depression. Dr. Koch also administered the Halstead Reitan Battery and found that Claimant suffered from "moderate neuropsychological impairments with a neuropsychological deficit scale score of 43." Dr. Koch opined

Claimant was permanently totally disabled based on his cognitive limitations, his neuropsychological deficits, his orthopedic limitations, and his chronic pain problem. (CX-11, p. 3). He suggested that a different outcome may have resulted had Claimant not been "functionally illiterate" at the outset and had "cognitive skills to fall back upon, when physically compromised." (CX-11, pp. 3-4).

Dr. Charles Winters

On January 9, 2004, Claimant was examined by Dr. Winters at Bienville Orthopaedic Specialists. Dr. Winters's credentials are not set forth in the record. Claimant was receiving follow-up treatment for his lower back. Dr. Winters noted Claimant's history of depression and peptic ulcer disease, as well as a surgical history which included back surgery and right knee, right hip, and left foot procedures. Claimant's lower back pain was described as "mild to moderate, worse with activity, better with rest, better with the Mobic." Dr. Winters indicated Claimant had a "normal gait" and "neutral" posture. He diagnosed Claimant with low back pain and continued him on Mobic. (CX-12, pp. 1-2).

On April 7, 2004, Dr. Winters performed an evaluation of Claimant's right knee. Claimant presented with complaints of knee pain, swelling, and "giving out." Dr. Winters noted Claimant hurt his knee in the fall in which he hurt his back and hip. Claimant indicated a tendency to "want to fall" due to his other injuries. A physical examination of Claimant's left and right knees revealed no effusion or swelling. Dr. Winters found a normal range of motion and "increased laxity with valgus stress at 30 degrees, but not at 0 degrees." Dr. Winters noted no tenderness to palpitation and indicated Claimant's lower extremities displayed normal muscle strength and motor tone. Dr. Winters diagnosed Claimant with knee joint pain and expressed concern at the "laxity with valgus stress." X-rays of Claimant's knees showed minimal degenerative changes and no significant abnormalities. (CX-12, p. 4).

On May 6, 2004, Claimant underwent an MRI of his right knee, which was reviewed by Dr. Winters on May 12, 2004. The MRI showed some degenerative changes in the medial meniscus. Although there was no acute injury to Claimant's ACL, Dr. Winters found "definite laxity." He opined Claimant suffered from chronic injury to his medial collateral ligament. The results of Claimant's physical examination remained identical to those of the April 7, 2004 examination. (CX-12, p. 8).

On May 20, 2004, Claimant was examined by Dr. Jeffrey Noblin for his right knee upon referral by Dr. Winters. Claimant indicated his knee was "not stable" and he had fallen "several times because his knee gives out on him." According to Claimant's subjective complaints, his right knee gave out causing him to fracture his left heel and right acetabulum. Claimant complained of his knee giving way when he "steps down on it" or walks on uneven surfaces. (CX-12, p. 9). Upon physical examination, Dr. Noblin found no significant right knee instability. Claimant's "ACL" and "MCL" were intact. Dr. Noblin found significant "patellofemoral crepitus with extension" and tenderness on the medial and lateral joint line. Extensions and full flexion were present. He diagnosed knee joint pain. He opined Claimant did not suffer from knee joint instability, but suggested there may be a "small loose body not detected by MRI." Dr. Noblin recommended strengthening, anti-inflammatory medications, and a brace. He also suggested a diagnostic arthroscopy. Regarding the knee "giving way," Dr. Noblin opined that Claimant's right hip injury may have effected his sciatic nerve, causing his "quad" to be weak. (CX-12, p. 10).

Dr. Henry Maggio

Dr. Maggio is board-certified in psychiatry and neurology. On August 4, 2004, he rendered a report at the request of Employer after interviewing Claimant and reviewing the available medical records. (EX-3, pp. 1-3). During the interview, Claimant informed Dr. Maggio that he suffered a work-related knee injury in 1998, a back injury in 1999, and fractured his right hip and left heel in 2001. He identified his "main problems" as his back, his right hip, his left ankle, and his knee. According to Claimant, Dr. Noblin was seeking authorization for surgery on his "torn ligaments." (EX-3, pp. 3-4).

Dr. Maggio noted Claimant began treatment with the Gulf Coast Mental Health Center on November 11, 2003, and was diagnosed with "a Depressive Disorder NOS." Claimant believed he was angry, rather than depressed. At the time of the interview, Claimant was being treated with the following medications: (1) Paxil CR 25 mg daily, (2) Trazadone 150 mg at bedtime, (3) Lortabs 10 mg, and (4) Neurontin 800 mg. (EX-3, p. 4).

Dr. Maggio's report reflects that Claimant became impotent

after undergoing surgery and treatment for his "fracture of the acetabulum of the hip" at Tulane Hospital. Claimant experienced "gross swelling of his penis and his testicles, which lasted for a month." Claimant expressed frustration with being impotent and noted that he received no explanation from the "orthopedic people." (EX-3, pp. 4-5).

Dr. Maggio found Claimant to appear defensive and not complying at the beginning of the interview. However, Claimant "warmed up" as he vented his anger and frustration. Dr. Maggio opined Claimant has a mental condition referred to as "DSM IV Diagnosis/Axis I: Adjustment Disorder with Mixed Emotions of Anxiety and Depressed Mood."[8] According to Dr. Maggio, an "adjustment disorder" is a "response to stressors placed in one's life and you respond with either anxiety, depression or a combination of anxiety and depression." The condition is not permanent nor disabling, and he opined Claimant will return to his normal self once his "stressors" are removed. Dr. Maggio identified Claimant's stressors as his right knee injury, back injury, hip and ankle injuries, and his impotency. (EX-3, pp. 5-6). Dr. Maggio opined regarding Claimant's condition: "It does not appear to be work-related," without any further specificity.[9]

Dr. Maggio did not find Claimant to be disabled from a mental standpoint. His complaint of anger was treated with "appropriate medication." Dr. Maggio noted Claimant was taking up to 200 Lortabs per month, a dosage which in itself will cause depression. He further noted Claimant did not suffer from "Major Depression" or display psychosis. Dr. Maggio indicated that Claimant's use of narcotics and Paxil could result in his impotency. He recommended use of a different antidepressant. (EX-3, p. 7).

The Contentions of the Parties

Employer filed a Motion for Modification of the original Decision and Order in this case. According to Employer, after the original hearing, the record was left open solely for

[8] Dr. Maggio's diagnostic impression also included a diagnosis of Axis III "Pain Disorder Associate with Both Psychological Factors and a General Medical Condition – Back Pain – Chronic." (EX-3, p. 5).

[9] If he is referring to Claimant's mental condition, his opinion is contradictory in view of the enabling stressors which are work-related. (EX-3, p. 6).

submission of Dr. Flores's deposition. Consequently, Employer contends it was not afforded the opportunity to identify suitable alternative employment using the permanent restrictions assigned to Claimant's knee by Dr. Flores. Employer argues that a modification is warranted because it has new vocational evidence that was not available at the prior hearing. Further, Employer contends its new vocational evidence shows a change in Claimant's economic condition, sufficient to support a modification of the original Decision and Order in this case. Finally, Employer requests a denial of Claimant's Motion for Modification, arguing that Claimant failed to allege a mistake in fact or claim a change in condition. Employer contends any ongoing "problems" alleged by Claimant are unrelated to Claimant's employment.

Claimant contends that Employer failed to identify suitable alternative employment and that Claimant remains totally permanently disabled from work. Claimant alleges he suffers from work-related psychiatric conditions and that his physical and mental conditions have "deteriorated since the formal hearing." Further, Claimant contends he has presented additional proof to establish that his right hip and left foot/ankle injuries are work-related. Claimant requests "relief" for all work-related injuries, including a "continued course of medical care" for the worsening of and possible surgery to Claimant's right knee condition.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v.

Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Applicability of Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Incorporated, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**, and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). An administrative law judge, as

trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. See Rambo I, at 295; Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 465, 88 S.Ct. 1140, 1144 (1968). However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping and Terminal Company, 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, at 296. There are two recurring economic changes that permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable, or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, at 296. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. See Rambo I, 515 U.S. at 296, 30 BRBS at 3 (CRT); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Vasquez, 23 BRBS at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategy/tactics, errors or misjudgments of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], supra, McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Washington Stevedoring Company, supra, at 204.

The Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, at 71; Old Ben Coal Company v. Director, OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT)(7th Cir. 2001). DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary **res judicata** principles, the interest in "getting it right," even belatedly, will almost invariably outweigh the interest in finality. Kinlaw, at 71.

B. The Threshold Requirement under Section 22 of the Act

I find that Claimant has met the threshold requirement for modification under Section 22 of the Act by presenting a possible change in Claimant's physical condition. Among the new medical evidence submitted by Claimant are reports from mental health professionals that suggest Claimant's psychiatric conditions may have deteriorated subsequent to the original hearing and the resulting Decision and Order of January 14, 2004. Additionally, Claimant has provided recent medical records from orthopedists, which he argues establish deterioration in his physical condition due to a worsening in his right knee and back conditions. Consequently, I find and conclude that Claimant has presented sufficient new information to warrant consideration of modification under Section 22 of the Act. Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Claimant's motion and reopen the record to consider modification of the prior Decision and Order.

I find and conclude that Employer has not met the threshold requirement for modification under Section 22 of the Act, as it has not presented a change in Claimant's economic conditions or circumstances. Employer contends modification is appropriate because suitable alternative employment has become available since the time of the initial hearing and the issuance of the initial Decision and Order in this matter. After the original hearing in this case, the record was left open for submission of Dr. Flores's deposition testimony. A letter from Dr. Flores was attached as an exhibit to his deposition testimony in which Dr. Flores assigned permanent work restrictions to Claimant due to the right knee and lower back injuries. According to Dr. Flores, Claimant could not engage in heavy lifting, crawling, or ladder climbing due to his right knee injury. Further, Claimant could not engage in bending, squatting, pushing, heavy lifting, crawling, or ladder climbing due to his back injury. Employer argues these restrictions were not available at the time of the

initial hearing and, therefore, Employer was not able to generate vocational evidence identifying suitable employment commensurate with Claimant's restrictions.

Although the restrictions set forth by Dr. Flores were not available at the time of hearing, a review of the record indicates that other physicians had recommended work restrictions prior to hearing and these restrictions were contained in the original record. In 1998, Dr. Penden released Claimant to light duty work with no climbing, kneeling, or squatting due to his right knee injury. Although Dr. Flores assigned restrictions of his own between the time of the original hearing and his deposition, Dr. Flores nonetheless indicated in his deposition that he would defer to Dr. Jackson's opinion of June 15, 2000, regarding Claimant's MMI and work restrictions due to the back injury. Thus, although the opinion and specific restrictions assigned by Dr. Flores were not contained in the record at the time of original hearing, the limitations assigned by Dr. Jackson were in fact available. According to Dr. Jackson, Claimant "should not return to work at any more than a light to light sedentary level of work." Further, Dr. Graham opined Claimant would be subject to the following temporary work restrictions: limited carrying overhead, climbing scaffolds, ropes or poles, and 20 pounds lifting. Consequently, I find that despite the absence of permanent restrictions assigned by Dr. Flores, the record at the time of original hearing provided the opinions of several doctors which assigned at least similar restrictions from which Employer could have attempted to find suitable alternative employment.

Consequently, I find and conclude that Employer's failure to submit evidence of suitable alternative employment at the first hearing was the result of Employer's "litigation strategy" and that Employer has not presented "extenuating circumstances that prevented it from doing so." Jensen, 34 BRBS at 150-151. Arguably, the present case is similar to Delay, supra, where the Board held that the ALJ erred in failing to consider evidence of suitable alternative employment in a modification proceeding. In Delay, a "physical capacities evaluation" was administered prior to formal hearing, but was not disclosed by the claimant. The ALJ ordered its disclosure for the modification hearing. Because of the new medical evidence, the employer conducted labor market surveys after the issuance of the original decision and order, and the Board found the ALJ abused her discretion in not considering this new evidence. Delay, 31 BRBS at 204-205. I find Delay distinguishable because essentially no "new"

medical evidence was submitted post-hearing. Additionally, unlike Delay, Employer failed to even attempt to establish suitable alternative employment in the present case at the initial hearing.

I find the present case more analogous to Lombardi v. Universal Maritime Service Corporation, 32 BRBS 83 (1998) and Feld v. General Dynamic Corporation, 34 BRBS 131 (2000). In both cases, the employers declined to attempt to establish suitable alternative employment at the time of the original hearings, but later filed a motion for modification to present suitable alternative employment. In both cases, the Board held that the employers' failure to introduce suitable alternative employment at the first hearing was a "litigation strategy" and that, absent "extenuating circumstances," a modification of the original Decisions and Orders was inappropriate. See Lombardi, supra; Feld, supra.

Employer did not present any evidence of suitable alternative employment at the time of the original hearing. Consequently, a modification pursuant to Section 22 is not appropriate based on a mistake of fact. Further, I find and conclude Employer has not established a change in Claimant's physical or economic condition since the time of the original hearing. Employer has not demonstrated an improvement or worsening in Claimant's physical condition or earning capacity which would lessen its liability to Claimant. Further, Employer arguably had the opportunity after the initial hearing to request that the record be held open for the presentation of evidence of suitable alternative employment in light of Dr. Flores's restrictions, and failed to do so. Consequently, I find and conclude that Employer's requested modification would not further render justice under that act.

Based on the foregoing, Employer's motion for modification is **DENIED.**

Assuming **arguendo** that Employer/Carrier's request for modification is procedurally appropriate, I find and conclude, for the following reasons, that the requested modification based on a showing of Claimant's ability to perform suitable alternative employment should be **DENIED.**

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age,

education, work experience, and physical restrictions, and which he could secure if he diligently tried. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981).

Claimant was previously assigned permanent restrictions for his right knee due to his work-related right knee injury. I maintain the conclusion that Claimant's right hip and left ankle/foot injuries are not work-related, see discussion infra. Nonetheless, any physical limitations resulting from the non-work-related injuries must still be considered when determining Claimant's vocational capabilities. In addition, Drs. Koch and Maggio opined Claimant suffers from a mental condition. Regardless of the nature and extent of his mental condition, the psychological injury will arguably affect Claimant's ability to secure and maintain employment. Further, I find Claimant credibly testified concerning his symptoms and the side effects of his medications. Accordingly, all of Claimant's physical and mental restrictions and limitations must be considered in determining whether Employer has presented evidence of suitable alternative employment.

According to the testimony and reports of Mr. Walker and Ms. Hutchins, only Assumption No. 3 considers Claimant's physical history, along with the factors of pain, discomfort, and lack of tolerance to activity. Further, only Assumption No. 3 considers Claimant's depression, any psychological factors that would hinder his attention and concentration, and the side effects of his medication. Both Mr. Walker and Ms. Hutchins agreed that, when due consideration is given to the factors identified in Assumption No. 3, Claimant would not be able to return to employment. Based on the foregoing, I find and conclude that a preponderance of the evidence supports a conclusion that Assumption No. 3 is the most appropriate vocational profile for Claimant and accordingly he is not capable of performing the identified alternative employment opportunities, which I find are not suitable for Claimant.

C. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a

> claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

1. Claimant's Prima Facie Case

a. The June 16, 1998 Right Knee Injury

At the original hearing in this case, both parties stipulated that Claimant's right knee injury was work-related, having occurred in the course and scope of his employment with Employer. Neither party has requested a modification of the Decision and Order findings and conclusions with respect to the right knee. Accordingly, I find and conclude that Claimant's right knee injury remains a compensable injury.

b. The August 30, 1999 Back Injury

In the original Decision and Order, the undersigned found and concluded that Claimant suffered from a compensable, work-related back injury. In the modification requests, neither party contests the finding of compensability. Consequently, I find no reason to disturb the original Decision and Order on

this issue and conclude that Claimant's back injury of August 30, 1999, remains compensable for the reasons set forth in the original Decision and Order.

c. The Hip, Ankle/Foot Injuries

In his Motion for Modification, Claimant requests relief for his "work-related injuries" including injuries to his hip and ankle/foot. However, at the time of the original hearing, the undersigned found and concluded that Claimant failed to establish the existence of compensable hip and ankle/foot injuries. Claimant contended that his April 28, 2001 fall and resulting injuries were related to his prior work-related knee injury. After weighing all the evidence, the undersigned found Claimant's allegations were not corroborated by the medical records and his testimony regarding the incident lacked credibility. Consequently, no causal relationship was established between Claimant's employment and his right hip and left ankle/foot injuries; Claimant was thus denied compensation for these injuries in view of a lack of a causal relationship.

Claimant now requests that the findings of the original hearing be reconsidered in light of "additional proof of give-way of his right knee." He argues that his hip and ankle/foot injuries have resulted from the "natural progression of Claimant's original industrial knee injury."

Parties are not allowed to revisit the issue of causal relationship on a motion for modification, unless a mistake of fact can be proved. Thompson v. Quinton Engineers, Inc., 6 BRBS 62 (1977). In his "First Response to Employer/Carrier's Objection to Claimant's Motion for Modification," Claimant alleges a mistake of fact regarding the causation of his hip and ankle/foot injuries. In support of his contentions, Claimant submitted medical records from Tulane Medical Center and Bienville Orthopaedic Specialists concerning his hip and ankle/foot injuries. The medical records from Tulane Medical Center primarily concern Claimant's surgeries and hospital stays in 2001, when he underwent corrective procedures for his right hip fracture and his left calcaneus fracture. The records from Tulane Medical Center, however, offer no new evidence on the issue of causation and were in fact available before the initial hearing. No explanation for Claimant's failure to offer these records at the original hearing was offered. The medicals submitted from Tulane Medical Center repeatedly identify the cause of Claimant's injuries as a "fall" at church "from a ladder." The medical records do not offer any support for the

contention that Claimant's "fall" was caused by his right knee giving-way.

Claimant also submitted medical reports from Drs. Winters and Noblin with Bienville Orthopaedic Specialists. Dr. Winters's April 7, 2004 report identifies Claimant's chief complaint as relating to "recent" problems with his right knee giving out. Dr. Winters was primarily concerned with a finding of "laxity with valgus stress" in Claimant's right knee which he opined could reflect an injury to Claimant's medial collateral ligament. An MRI scan of the knee revealed some degenerative changes. Dr. Winters referred Claimant to Dr. Noblin for further evaluation and to determine if the "meniscal degenerative changes" present on the MRI actually reflected a meniscal tear. Dr. Noblin, however, opined that Claimant had no right knee instability. Further, Dr. Noblin recommended, at Claimant's request, that Claimant wear a knee brace.[10] Dr. Noblin opined that "he possibly might have had some effect in the sciatic nerve on the right hip with the injury he previously had causing his quad to be weak on this right side and it could be causing his giving way." The record does not contain a response opinion from Dr. Winters.

Claimant also presented the testimony of Andrea Coote who testified that she witnessed Claimant "stumble" in his home within the last three to four months, at which time he informed Ms. Coote that his "knee buckled." Claimant himself testified that he has continued instances of "give-way" with his right knee, specifically recalling an instance when he fell in his bathroom and broke the little toe on his right foot. However, he did not seek medical attention for this injury. Claimant also testified that Dr. Noblin prescribed a brace for his right knee to "stop it from buckling" and is "trying to get approval for surgery."

Although Claimant presented some evidence to support his contention that his right knee gives-way, Claimant offered no medical opinions that establish a connection between the "give-way" and any injuries to his right hip and left ankle/foot. Dr. Winters noted that Claimant complained of "recent" give-way of his right knee at the April 7, 2004 examination. Despite Dr. Winters's finding of "laxity" in Claimant's right knee, Dr. Noblin found no instability. Dr. Noblin further opined that any give-way in Claimant's knee was likely the result of "quad"

[10] According to Dr. Noblin's report: "My recommendation is to continue to work on strengthening, anti-inflammatory medications and a brace, which he [Claimant] wants to wear." (CX-12, p. 10).

weakness caused by "some effect in the sciatic nerve on the right hip with the injury he previously had . . ." I afford greater weight to the opinion of Dr. Noblin because he examined Claimant upon the referral of Dr. Winters and the record does not contain an opinion by Dr. Winters in response to Dr. Noblin's conclusions.

His new evidence consists of his subjective history reported to Drs. Koch, Maggio, and Noblin in 2004 which are contrary and inconsistent with a history reported at the time of his hip and ankle/foot injury. Given Claimant's prior testimony and medical reports, I find his belated efforts to attribute causation to his knee "giving way" to be incredible.

Consequently, I find and conclude Claimant has failed to present evidence of a mistake of fact in the original Decision and Order because Claimant has not offered any additional proof that his hip and ankle/foot injuries were caused by a give-way of his right knee. Claimant may have established "recent" give-way of his right knee through his own testimony, the testimony of Ms. Coote, and the medical reports of Dr. Winters. However, I find and conclude this is not sufficient to establish past give-way of Claimant's right knee at the time of his April 28, 2001 injuries. Further, the medical records submitted by Claimant offer no support for a contention that Claimant has suffered worsened conditions in his hip and ankle/foot since the issuance of the original Decision and Order.

Based on the foregoing, I decline to modify the original Decision and Order on this issue. I find that Claimant has failed to establish a mistake of fact or a change in his physical condition regarding the hip and ankle/foot injuries. Further, I find and conclude that, without supporting medical records, Claimant has not established a worsening of his injuries due to his right knee injury. Consequently, I find and conclude that Claimant has not presented sufficient evidence to establish a **prima facie** case or to invoke the Section 20(a) presumption regarding his hip and ankle/foot injuries.

d. The Psychological Injury

Claimant contends he suffers from psychiatric injuries stemming from his work-related injuries. The record indicates Claimant began treatment at the Gulf Coast Mental Health Center in November 2003. According to the records of the Gulf Coast Mental Health Center, Claimant was diagnosed with "Depressive Disorder Not Otherwise Specified." Dr. Koch also performed a

psychiatric evaluation of Claimant in which he opined Claimant suffered from "Major Depressive Disorder with Psychotic Features." Dr. Maggio opined Claimant suffered from "Adjustment Disorder with Mixed Anxiety and Depressed Mood." Dr. Koch disagreed because Dr. Maggio did not characterize the disorder as "chronic." Both doctors were in agreement, however, as to Dr. Maggio's secondary diagnosis of "Pain Disorder Associated with Both Psychological Factors and a General Medical Condition – Back Pain – Chronic," although, Dr. Koch would include Claimant's knee pain as a factor.

All mental health professionals consulted in this case diagnosed Claimant with a mental condition, although the doctors did not generate identical diagnoses of Claimant's condition. Additionally, the reports in the record support a connection, at least in part, between Claimant's psychological status/stressors, and his work-related injuries and pain. Consequently, I find and conclude Claimant has established a **prima facie** case sufficient to invoke the Section 20(a) presumption for his psychological condition.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994);. "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

In response to Claimant's **prima facie** case of psychological injury, Employer submitted a report from Dr. Maggio. In his psychiatric evaluation of Claimant, Dr. Maggio noted that Claimant was "taking up to 200 Lortabs a month." According to Dr. Maggio, increased dosages of narcotic medicines taken over a period of time will in itself cause depression. He further noted that such narcotic medication can cause sexual dysfunction. Dr. Koch agreed that Lortab can "compound and exacerbate [Claimant's] depression" and further concurred that it could negate the benefits of Viagra. Employer observes that Claimant did not seek psychiatric treatment until November 2003, approximately five years after suffering a right knee injury and approximately four years after suffering a lower back injury. Based on the information contained in Dr. Maggio's report, I

find and conclude Employer has presented substantial evidence to rebut the Section 20(a) presumption and to support its contention that Claimant's psychological injuries are not work-related. Therefore, the record evidence as a whole must be weighed and evaluated to determine work-relatedness and causation.

3. Weighing all the evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

According to all three mental health professionals, Claimant suffers from a depressive disorder. A "Face Sheet" from Gulf Coast Medical Center dated November 11, 2003 reflects Claimant presented with "depression, anger for app. 5 years." Gulf Coast Mental Health Center noted that Claimant's depression at least partially stems from his difficulty in dealing with daily pain. Dr. Koch similarly indicated Claimant experiences "health concerns and discomfort." Neither Gulf Coast Mental Health Center nor Dr. Koch identified the "daily pain" or "health concerns" from which Claimant's depression stemmed. However, the psychiatric evaluation by Dr. Maggio provided one diagnosis of "Pain Disorder Associated with Both Psychological Factors and a General Medical Condition – Back Pain – Chronic." Subsequently, Dr. Koch agreed with Dr. Maggio's diagnosis, but suggested that it include Claimant's painful knee injury as well.

Although Dr. Maggio suggested that Claimant's depression and sexual dysfunction could likely stem from his use of narcotic medication, I find and conclude that Claimant's psychological injuries would still be work-related. Although Claimant testified that he does not take medication for his knee

injury, a review of the medical records indicates Claimant was prescribed Lortabs for his lower back pain by Dr. Whitecloud on June 2, 2003. Consequently, the use of the narcotic medication is the result of an injury that the undersigned has already found compensable and work-related. Thus, I find and conclude that any psychological side effects of such medication are also compensable. Further, both Dr. Koch and Dr. Maggio opined Claimant suffers from a pain disorder related at least to his work-related lower back injury, and possibly to his work-related knee injury as well. Consequently, I find and conclude the medical records establish a causal connection between Claimant's mental disorders and his work-related back and right knee injuries. Accordingly, I find and conclude that Claimant's psychological condition is also compensable under the Act.

D. Nature and Extent of Disability

Having found that Claimant suffers from a compensable psychological injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability

is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and

maximum medical improvement will be treated concurrently for purposes of explication.

I find that Claimant has failed to present a **prima facie** case of total disability with respect to his psychological condition. On August 4, 2002, Dr. Maggio opined Claimant's Axis I diagnosis was "Adjustment Disorder with Mixed Emotions of Anxiety and Depressed Mood." Dr. Maggio specified that his diagnosis is "not a permanent condition in itself; it is not a disabling condition . . ." According to Dr. Maggio, the adjustment disorder was a response to "stressors" in one's life and expected Claimant to "revert back to his usual self" once the "stressors" were removed. Dr. Maggio went on to opine that Claimant was not disabled from a mental standpoint and he did not identify any work restrictions.

While the medical records from the Gulf Coast Mental Health Center suggest Claimant suffered from "Social Functioning Impairment," which it specified as "ability to function with family, vocational/educational, and other social contexts," only Dr. Koch opined Claimant was permanently and totally disabled. In arriving at a conclusion of permanent total disability, Dr. Koch considered "the cognitive limitations, which this patient suffers from neuropsychological deficits, his orthopedic limitations, and his chronic pain problems." Dr. Koch continued by suggesting Claimant was "functionally illiterate" with "limited intellectual abilities." According to Dr. Koch, Claimant's disability outcome would have been different if Claimant had "cognitive skills to fall back upon." Dr. Koch failed to provide any work restrictions for Claimant.

The record contains only reports from Dr. Maggio and Dr. Koch. Dr. Maggio, Dr. Koch, and the Gulf Coast Mental Health Center did not place Claimant under any work restrictions related to his psychological injuries. Dr. Maggio clearly opined Claimant did not suffer from a permanent or disabling mental condition, which is in direct contradiction to the conclusion of Dr. Koch. However, in reaching his conclusion, Dr. Koch considered Claimant's psychological injury along with other limitations, i.e. Claimant's limited cognitive abilities, orthopedic limitations, and chronic pain. Consequently, I find that the record is balanced at best concerning the nature and extent of Claimant's psychological disability.

The proponent of a rule or position has the burden of proof, by preponderance of the evidence, in cases resolved under the Administrative Procedures Act. See Greenwich Collieries,

supra; Santoro v. Maher Terminals, Inc., 30 BRBS 171 (1996). Because I conclude that Claimant has not established by a preponderance of the record evidence that he suffers from a permanent disabling mental condition, Claimant has not met his burden of proof under the Act. I find he has a compensable temporary psychological condition caused by stressors that are work-related and which must be considered in his vocational capability. Nevertheless, I find and conclude that Claimant remains totally and permanently disabled as a result of his right knee injury as held in the original Decision and Order.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

Employer remains responsible for any reasonable and necessary medical bills arising from his work-related right knee and lower back injuries. Despite the finding that Claimant's lower back injury was temporary, the medical records from Dr. Whitecloud and Dr. Winters indicate Claimant still experiences lower back pain. I find and conclude that treatment for such pain is a reasonable and necessary medical expense. However, Claimant's testimony suggested that Dr. Noblin is seeking approval for a knee surgery. Dr. Noblin, however, opined that Claimant "cannot have anything done" for his knee, but suggested a "diagnostic arthroscopy in order for him to access the inside and let him understand and realize there is nothing significant in his knee." Dr. Noblin's recommendation arguably does not establish the necessity of diagnostic arthroscopy. Consequently, I find and conclude that Employer is not responsible for the cost of such procedure as Claimant has not established the arthroscopy as "reasonable and necessary." However, Dr. Noblin did suggest continued treatment of Claimant's right knee due to "a sharp burning mechanical type pain." Accordingly, I find and conclude any future medicals related to such treatment are reasonable and necessary.

Having found that Claimant also suffers a temporary psychological injury, I find and conclude Claimant is entitled to past, present, and future reasonable and necessary medical benefits for his work-related psychological injury.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[11] A

[11] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 11,**

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier's request for modification is **DENIED**.

2. Claimant's request for modification is **DENIED** in part and **GRANTED** in part.

3. Employer/Carrier shall continue to pay Claimant compensation for permanent total disability from December 12, 1999 to present and continuing, based on Claimant's average weekly wage of $677.13, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

4. Employer/Carrier shall continue to pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's June 16, 1998 work injury to his right knee, his August 17, 1999 work injury to his back, and his psychological condition found to be, in part, work-related, but excluding any medical benefits attributable to his April 28, 2001 hip and ankle/foot injuries, pursuant to the provisions of Section 7 of the Act.

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days from

2004, the date this matter was remanded from the Board for consideration of modification proceedings.

the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 23rd day of December, 2004, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge